

ATTORNEY GENERAL - OFFICE COPY

No. 03-74628

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RECEIVED
OFFICE OF THE CLERK
U.S. COURT OF APPEALS
PUBLIC INFORMATION UNIT
04 MAR 19 AM 10:59

SAN LUIS OBISPO MOTHERS FOR PEACE, SIERRA CLUB,
and PEG PINARD,

Petitioners,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION
and the UNITED STATES OF AMERICA,

Respondents.

PACIFIC GAS & ELECTRIC COMPANY,

Intervenor-Respondent.

On Petition for Review of Orders of the
United States Nuclear Regulatory Commission

BRIEF OF THE STATES OF CALIFORNIA, MASSACHUSETTS, UTAH
AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF PETITIONERS

BILL LOCKYER
Attorney General of California
MANUEL MEDEIROS
State Solicitor General
THOMAS GREENE
Chief Assistant Attorney General
THEODORA BERGER, Senior
Assistant Attorney General
KEVIN JAMES (CSB# 111103)
Deputy Attorney General

California Department of Justice
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550
Tel.: (510) 622-2201
Fax: (510) 622-2270

Attorneys for Amicus Curiae
State of California

[Counsel Continued on Inside Cover]

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTRODUCTION AND INTEREST OF AMICI CURIAE	1
ARGUMENT	4
I. THE NRC'S STATED REASONS FOR FAILING TO ADDRESS TERRORISM IN ITS ENVIRONMENTAL ANALYSIS ARE FACTUALLY ERRONEOUS AND LEGALLY INSUFFICIENT	4
II. THE NRC'S FAILURE TO EVALUATE THE ENVIRONMENTAL EFFECTS OF TERRORISM DIRECTED AGAINST THE PROPOSED EXPANDED NUCLEAR WASTE STORAGE FACILITIES VIOLATES NEPA	16
CONCLUSION	23
CERTIFICATE OF COMPLIANCE	25

TABLE OF AUTHORITIES

	Page
Cases	
<i>Blue Mountains Biodiversity Project v. Blackwood</i> 161 F.3d 1208 (9 th Cir. 1998) <i>cert. denied</i> , 527 U.S. 1003 (1999)	21
<i>Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n.</i> 449 F.2d 1109 (D.C. Cir. 1971)	17
<i>Concerned About Trident v. Rumsfeld</i> 555 F.2d 817 (D.C. Cir. 1977)	15
<i>Foundation for N. Am. Wild Sheep v. United States Dept. of Agric.</i> 681 F.2d 1172 (9 th Cir. 1982)	18
<i>Idaho Sporting Congress v. Thomas</i> 137 F.3d 1146 (9 th Cir. 1998)	19
<i>LaFlamme v. Federal Energy Regulatory Comm'n.</i> 852 F.2d 389 (9 th Cir. 1988)	21
<i>National Parks & Conservation Ass'n. v. Babbitt</i> 241 F.3d 722 (9 th Cir. 2001) <i>cert. denied</i> , 534 U.S. 1104 (2002)	17-19
<i>Native Ecosystems Council v. Dombeck</i> 304 F.3d 886 (9 th Cir. 2002)	20

TABLE OF AUTHORITIES (continued)

Page

<i>Natural Resources Defense Council v. Duvall</i> 777 F.Supp. 1533 (E.D. Cal. 1991)	18
<i>Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n.</i> 606 F.2d 1261 (D.C. Cir. 1979)	21
<i>No GWEN Alliance of Lane County, Inc. v. Aldridge</i> 855 F.2d 1380 (9 th Cir. 1988)	15, 16
<i>Public Citizen v. Department of Transp.</i> 316 F.3d 1002 (9 th Cir.) <i>cert. granted sub nom. Department of Transp. v. Public Citizen</i> _____ U.S. _____, 124 S.Ct. 957 (2003)	17
<i>Save the Yaak Comm. v. Block</i> 840 F.2d 714 (9 th Cir. 1988)	18, 21
<i>Southwest Ctr. for Biological Diversity v. United States Forest Service</i> 100 F.3d 1443 (9 th Cir. 1996)	20
<i>Weinberger v. Catholic Action of Hawaii</i> 454 U.S. 139 (1981)	16

TABLE OF AUTHORITIES (continued)

Page

Administrative Decisions

Dominion Nuclear Connecticut, Inc.

Millstone Nuclear Power Station, Unit 3

CLI-02-27, 56 NRC 367 (2002) 4

Duke Cogema Stone & Webster

Savannah River Mixed Oxide Fuel Fabrication Facility

CLI-02-24, 56 NRC 335 (2002) 4

Duke Energy Corp.

McGuire Nuclear Station, Units 1 and 2;

and Catawba Nuclear Power Station, Units 1 & 2

CLI-02-26, 56 NRC 358 (2002) 4

Pacific Gas & Electric Company

Diablo Canyon Power Plant Independent Spent Fuel Storage Installation

CLI-03-1, 57 NRC 1 (2003) 4, 22

Private Fuel Storage, L.L.C.

Independent Spent Fuel Storage Installation

CLI-02-25, 56 NRC 340 (2002) 4, 5, 12, 14, 15

Statutes

National Environmental Policy Act

42 United States Code

§§ 4321-4370(f) 1

§ 4332(2)(C) 17

TABLE OF AUTHORITIES (continued)

	Page
Federal Regulations	
40 Code of Federal Regulations	
§ 1501.4	18
§ 1508.9	18
Court Rules	
Federal Rule of Appellate Procedure 29(a)	1
Other Authorities	
Kenneth R. Bazinet and Richard Sisk, <u>N-Plant Attacks Feared</u> , The New York Daily News (February 1, 2002) at 5; 2002 WL 3165383	7
<u>Biggest U.S. Nuke Plant May Be Target</u> , CBSNEWS.com (March 20, 2003) http://www.cbsnews.com/stories/2003/03/07/iraq/main543112.shtml	9
George W. Bush, <u>The National Strategy for the Physical Protection of Critical Infrastructures and Key Assets</u> , 75 (February 2003) http://www.whitehouse.gov/pcipb/physical_strategy.pdf	12
<u>FBI Warns of Nuke Plant Danger</u> , CBSNEWS.com (May 1, 2003) http://www.cbsnews.com/stories/2003/09/04/attack/main571556.shtml	9
Bill Gertz, <u>Nuclear Plants Targeted</u> , The Washington Times (January 31, 2002) http://asp.washtimes.com/printarticle.asp?action=print&ArticleID =20020131-617330	6

TABLE OF AUTHORITIES (continued)

	Page
Bill Gertz, <u>Security Boosted at Nuke Facilities</u> , The Washington Times (May 14, 2002) http://www.ohiocitizen.org/campaigns/electric/pre2003/boosted.htm	7
Toni Locy, Kevin Johnson, Mimi Hall and John Diamond, <u>Source Gave U.S. Details of New Plot</u> , USA Today (January 12, 2004) http://usatoday.com/news/nation/2004-01-12-code-orange-cover_x.htm	11
<u>Nuclear Insecurity</u> , CBSNEWS.com (February 16, 2004) http://www.cbsnews.com/stories/2004/02/12/60minutes/main599957.shtml . . .	14
<u>Pennsylvania Governor Rendell Lowers State Homeland Security Threat to Yellow</u> , Pennsylvania Office of the Governor (January 9, 2004) http://biz.yahoo.com/prnews/040109/phf019_1.html	11
<u>Press Release</u> , United States Department of Justice, Federal Bureau of Investigation (October 24, 2002) http://www.fbi.gov/pressrel/pressrel02/nlets102402.htm	8
<u>Press Release</u> , United States Nuclear Regulatory Commission (April 29, 2003) http://www.nrc.gov/reading-rm/doc-collections/news/2003/03-053.html	9
<u>Rumsfeld: Greater Threats Ahead</u> , CBSNEWS.com, (January 31, 2002) http://www.cbsnews.com/stories/2002/02/20/attack/main501779.shtml	6
<u>Text of FBI Terror Warning</u> , CBSNEWS.com, (November 15, 2002) http://www.cbsnews.com/stories/2002/11/15/attack/main529501.shtml	8

TABLE OF AUTHORITIES (continued)

	Page
United States General Accounting Office, <u>Nuclear Regulatory Commission: Oversight of Security</u> , GAO-03-752 (September 4, 2003) http://www.gao.gov/new.items/d03752.pdf	10, 14
<u>Wide-Ranging New Terror Alerts</u> , CBSNEWS.com, (May 26, 2002) http://www.cbsnews.com/stories/2002/05/24/attack/main510054.shtml	8

INTRODUCTION AND INTEREST OF AMICI CURIAE

Pacific Gas and Electric Company (PG&E) has applied to the U.S. Nuclear Regulatory Commission (NRC) to expand the spent nuclear fuel storage facilities at PG&E's Diablo Canyon power plant (Diablo Canyon) near San Luis Obispo, California: PG&E seeks permission to construct and operate an Independent Spent Fuel Storage Installation (ISFSI) at that plant. The Environmental Report submitted by PG&E to the NRC pursuant to its application fails to contain any discussion of the potential environmental impact of acts of terrorism or sabotage directed against the proposed ISFSI. The NRC found the Environmental Report to be adequate, ruling that potential acts of terrorism directed against a proposed nuclear power facility, and the harm to the environment that would result from such acts, need not be considered or even discussed in licensing the facility because the possibility that acts of terror will be directed against the facility is too remote. Factually, this conclusion is at odds with statements made by the President, members of his cabinet, and other federal officials, and is belied by actions taken by the NRC itself, since September 11, 2001. Moreover, this conclusion is contrary to the letter and spirit of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370(f).

Amici file this brief pursuant to Federal Rule of Appellate Procedure 29(a)

seeking, among other things, a hearing on the potential environmental impact of acts of terrorism directed against the proposed ISFSI. Amici believe that such a hearing can be held pursuant to procedures previously employed by the NRC for conducting secure, *in camera* proceedings on Diablo Canyon security issues. In seeking such hearings, amici are recognizing the obvious: the proposed ISFSI is a potential terrorist target. Accordingly, amici request that the Petitioners, relevant state and local government agencies, and other interested members of the public be given the opportunity to present testimony, including expert testimony, to the NRC regarding how: (1) PG&E might reduce the possibility that the proposed ISFSI will be targeted by terrorists; (2) PG&E might reduce the chances of a successful terrorist attack on the proposed ISFSI; and (3) PG&E might reduce the public health and environmental effects of a successful attack on the proposed ISFSI. By seeking inclusion in PG&E's environmental analysis of a discussion of the potential impact of acts of terrorism and sabotage directed against the proposed ISFSI, amici seek to ensure that the NRC gives due consideration to proposals made by the Petitioners, relevant state and local authorities, and other interested members of the public, for reducing the possibility that the proposed ISFSI will be subject to successful terrorist attack.

There can be no doubt about the significance of constructing a new nuclear

facility in California. More than 35,000,000 people live in California; it is the world's fifth largest economy. A successful terrorist attack on a California nuclear facility, depending on its severity, could kill or injure thousands of people, permanently contaminate valuable California natural resources, and devastate the economies of both the state and the nation. Such a successful attack, moreover, would require California state and local government agencies to spend substantial sums -- potentially in the tens of millions of dollars -- responding to the attack, conducting decontamination activities, providing health services for the injured and their future offspring and repairing damaged infrastructure.

Amicus State of California has an obvious interest in ensuring that the risks inherent in the proposed expansion of Diablo Canyon's nuclear waste storage facilities be evaluated carefully and -- to the extent consistent with plant security -- with the opportunity for meaningful public participation. Amici the States of Massachusetts, Utah and Washington, all of which have or may shortly have federally-regulated nuclear facilities within their borders, have a similar interest in ensuring that proposed nuclear facilities are evaluated carefully and with the opportunity for meaningful public participation. This is no more than what NEPA requires.

ARGUMENT

I.

THE NRC'S STATED REASONS FOR FAILING TO ADDRESS TERRORISM IN ITS ENVIRONMENTAL ANALYSIS ARE FACTUALLY ERRONEOUS AND LEGALLY INSUFFICIENT

The NRC predicated its determination that NEPA requires neither an analysis of, nor hearings on, the potential environmental consequences of an act of terrorism directed against PG&E's proposed ISFSI, on its conclusion, reached in another matter, that the "possibility of a terrorist attack [on a proposed nuclear facility]. . . is speculative and simply too far removed from the natural or expected consequences of agency action to require a study under NEPA." *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 349 (2002), as quoted in *Pacific Gas & Electric Company*, (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-03-1, 57 NRC 1, 6 (2003).^{1/} This

1. The NRC reached a similar conclusion in three cases decided with *Private Fuel Storage: Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-24, 56 NRC 335 (2002); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-02-27, 56 NRC 367 (2002); and *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; and Catawba Nuclear Power Station, Units 1 & 2), CLI-02-26, 56 NRC 358 (2002).

conclusion defies logic, and is inconsistent with statements made and activities undertaken, subsequent to September 11, 2001, by the President, the members of his cabinet, and the NRC itself.

In *Private Fuel Storage*, the NRC advances four arguments in support of its position that the possibility of a terrorist attack on a proposed facility is simply too speculative and too far removed from the consequences of agency action to require NEPA analysis. First, *Private Fuel Storage* posits that the risk of a terrorist attack is not “a natural or inevitable product of licensing” a nuclear facility. *Private Fuel Storage*, 56 NRC at 347. This assertion ignores the fact that licensing any nuclear facility -- whether a reactor, a spent fuel pool, or a dry cask spent fuel storage facility -- near a community both makes the community a more likely terrorist target and makes the consequences of a successful terrorist attack far more devastating to the community.

Second, in *Private Fuel Storage*, the NRC reasons that “the likelihood of a terrorist attack being directed at a particular nuclear facility is not quantifiable.” *Private Fuel Storage*, 56 NRC at 350. This assertion ignores statements by senior government officials that further terrorist attacks on the United States, at least as devastating as those that occurred on September 11, 2001, are inevitable, and that nuclear facilities are likely targets:

- In his State of the Union Address on January 9, 2002, President Bush noted that U.S. intelligence agencies had uncovered plans of U.S. nuclear power plants at Al-Qaeda bases in Afghanistan, indicating that attacks at those facilities may have been planned. “We have found diagrams of American nuclear power plants and public water facilities, detailed instructions for making chemical weapons, surveillance maps of American cities, and thorough descriptions of landmarks in America and throughout the world,” said the President. Bill Gertz, Nuclear Plants Targeted, The Washington Times, January 31, 2002 (<http://asp.washtimes.com/printarticle.asp?action=print&ArticleID=20020131-617330>).
- On January 31, 2002, Defense Secretary Rumsfeld said that the U.S. Armed Forces must prepare for potential surprise attacks that could be worse than those inflicted on the United States on September 11, 2001. “These attacks could grow vastly more deadly than those we suffered on September 11, 2001,” said Rumsfeld. Rumsfeld: Greater Threats Ahead, CBSNEWS.com, January 31, 2002 (<http://www.cbsnews.com/>

stories/2002/02/20/attack/main501779.shtml). The same day, the NRC released an alert that it had issued to the nation's nuclear power plants on January 23, 2002. The NRC alert warned of the potential for an attack by terrorists who planned to crash a hijacked airliner into a nuclear facility. While the NRC alert stressed that the threat of a kamikaze plane attack was not corroborated, the alert said that "the attack was already planned" by three suspected Al-Qaeda operatives "already on the ground," who were trying to recruit non-Arabs for the terrorist mission. Kenneth R. Bazinet and Richard Sisk, N-Plant Attacks Feared, The New York Daily News, February 1, 2002, at 5; 2002 WL 3165383.

- On May 14, 2002, Gordon Johndroe, a spokesman for the Office of Homeland Security, noted that "[W]e know that Al-Qaeda has been gathering information and looking at nuclear facilities and other critical infrastructure as potential targets." Bill Gertz, Security Boosted at Nuke Facilities, The Washington Times, May 14, 2002 (<http://www.ohiocitizen.org/campaigns/electric/pre2003/boosted.htm>).

- On May 24, 2002, the NRC reported that the Nation's nuclear power plants had been placed on heightened alert, as a result of information gained by the intelligence community. Wide-Ranging New Terror Alerts, CBSNEWS.com, May 26, 2002 (<http://www.cbsnews.com/stories/2002/05/24/attack/main510054.shtml>).
- On October 24, 2002 the FBI issued a Threat Communication, warning that debriefings of Al-Qaeda detainees as of mid-October 2002 indicated that the group planned "to weaken the petroleum industry by conducting sea based attacks against large oil tankers and that such attacks may be part of more extensive operations against . . . energy related targets including oil facilities and nuclear power plants." Press Release, United States Department of Justice, Federal Bureau of Investigation, October 24, 2002 (<http://www.fbi.gov/pressrel/pressrel02/nlets102402.htm>).
- On November 15, 2002, the FBI sent a bulletin to law enforcement agencies, warning them that Al-Qaeda's "highest priority targets remain within the aviation, petroleum, and nuclear sectors . . ." Text of FBI Terror Warning, CBSNEWS.com, November 15, 2002 (<http://www>.

cbsnews.com/stories/2002/11/15/attack/main 529501.shtml).

- On March 20, 2003, Energy Secretary Abraham announced that terrorists might have targeted the Palo Verde nuclear power plant in Arizona; Arizona Governor Napolitano sent National Guard troops to provide additional security at that plant. Biggest U.S. Nuke Plant May Be Target, CBSNEWS.com, March 20, 2003 (<http://www.cbsnews.com/stories/2003/03/07/iraq/main543112.shtml>).
- On April 29, 2003, the NRC strengthened the Design Basis Threat (i.e., “the largest reasonable threat against which a regulated private guard force should be expected to defend”) applicable to the nation’s nuclear power plants. Press Release, United States Nuclear Regulatory Commission, April 29, 2003 (<http://www.nrc.gov/reading-rm/doc-collections/news/2003/03-053.html>).
- On May 1, 2003, the FBI issued a Threat Communication, warning the operators of the Nation’s nuclear power plants to remain vigilant about suspicious activity that could signal a potential terrorist attack. FBI Warns of Nuke Plant Danger, CBSNEWS.com, May 1, 2003 (http://www.cbsnews.com/stories/2003/05/01/story030501_01.shtml).

[//www.cbsnews.com/stories/2003/09/04/attack/main571556.shtml](http://www.cbsnews.com/stories/2003/09/04/attack/main571556.shtml)).

- On September 4, 2003, the United States General Accounting Office (“GAO”) issued a report, noting that the nation’s commercial nuclear power plants are possible terrorist targets and criticizing the NRC’s oversight and regulation of nuclear power plant security. United States General Accounting Office, Nuclear Regulatory Commission: Oversight of Security, GAO-03-752 (September 4, 2003) (<http://www.gao.gov/new.items/d03752.pdf>).
- On December 21, 2003, the Department of Homeland Security elevated the nationwide alert level to Code Orange, indicating a “high” risk of attack. The elevation of the alert level resulted in part from information provided by “[t]wo foreign sources, who had been reliable in the past . . . that Al-Qaeda was plotting attacks in Valdez, Alaska; Houston and Galveston, Texas; Tappahannock, VA; Belgium and Saudi Arabia. U.S. authorities concluded that terrorists might be targeting oil pipelines, refineries and nuclear power plants in or near those areas.” (Tappahannock is 74 miles from a nuclear power plant near Lake Anna,

Virginia). Toni Locy, Kevin Johnson, Mimi Hall and John Diamond, Source Gave U.S. Details of New Plot, USA Today, January 12, 2004 (http://usatoday.com/news/nation/2004-01-12-code-orange-cover_x.htm).

- When, on January 9, 2004, the Department of Homeland Security reduced the nationwide threat level to Code Yellow, it asked the Commonwealth of Pennsylvania to maintain heightened security measures at the five nuclear power plants in Pennsylvania. Pennsylvania Governor Rendell Lowers State Homeland Security Threat to Yellow, Pennsylvania Office of the Governor, January 9, 2004 (http://biz.yahoo.com/prnews/040109/phf019_1.html.)

These statements demonstrate that federal agencies do, in fact, routinely predict the degree and scope of the risk of terrorism confronting the nation, and particular infrastructure facilities -- including nuclear facilities -- within the nation, at specific

points in time.^{2/} Moreover, these statements indicate that, at a minimum, it is inevitable that a terrorist attack will be attempted against at least one American nuclear facility. To argue that, because we do not know when or where that attempt will take place, we need not consider the likelihood and consequences of a terrorist attack on a particular nuclear facility, at the time it is licensed, is to foreclose public discussion of a threat that senior government officials have determined to be realistic and substantial.

Third, in *Private Fuel Storage*, the NRC asserts that the risk of a terrorist attack on a nuclear facility is a “worst case scenario” and thus is exempt from NEPA scrutiny. *Private Fuel Storage*, 56 NRC at 352. This assertion, again, ignores statements made by senior government officials that serious terrorist attacks on the

2. The President’s National Strategy for the Protection of Critical Infrastructures and Key Assets pledges that the “NRC and [The Department of Homeland Security] will work with owners and operators of nuclear power plants to develop a standard methodology for conducting vulnerability and risk assessments.” George W. Bush, The National Strategy for the Physical Protection of Critical Infrastructures and Key Assets 75 (February 2003)(http://www.whitehouse.gov/pcipb/physical_strategy.pdf). This confirms that federal agencies predict the degree and scope of the risk of terrorism confronting national nuclear facilities at specific points in time and are working to standardize their methodology for making such predictions.

United States are inevitable, that nuclear power plants are potential targets for attack, and that attacks on American nuclear power plants have already been planned. As such, the potential for a terrorist attack is precisely like the potential for an earthquake -- the environmental consequences of which, in the case of Diablo Canyon, the NRC has conceded are subject to NEPA analysis. Terrorist attacks, like earthquakes, *will* occur -- the only question is whether “ground zero” will be a nuclear power plant.

The NRC’s contention that a terrorist attack on a nuclear facility is a “worst case scenario” is also belied by the NRC’s long standing practice, recently resumed, of conducting force-on-force exercises at the nation’s nuclear power plants. In these exercises, people pretending to be terrorists simulate an attack on a nuclear power plant in order to test the effectiveness of plant security procedures and personnel. These exercises are, by their very nature, unrealistic: the staff of the nuclear power plant under simulated attack knows in advance that the plant will be attacked. Indeed, the GAO recently criticized the NRC’s pre-September 11, 2001 force-on-force exercises as unrealistic in a number of *other* respects, as insufficiently frequent, and as essentially meaningless, because the exercises were typically conducted against plant security forces that had been specifically enhanced for the exercise.

Nonetheless, the results of the pre-September 11, 2001 force-on-force exercises conducted at the nation's nuclear power plants show that a successful attack on a nuclear power plant is far from a worst case scenario:

Plants that used increased numbers of guards, increased training, or increased defensive positions or barriers fared better in the [evaluations] than those that used the plant defenses specified in the [plant] security plan. According to the [plant security evaluation] reports, of the 45 plants that increased plant defenses beyond the level specified in the security plan, 10 (or 22 percent) failed to defeat the attackers in one or more of the exercises conducted during the [security evaluation]. *However, of the 35 plants that used only the security levels specified in the [plant security plan], 19 (or 54 percent) failed to defeat the attackers in one or more of the exercises conducted during the [security evaluation].*

United States General Accounting Office, Nuclear Regulatory Commission: Oversight of Security at 16-17 (emphasis added)^{3/}.

Finally, in *Private Fuel Storage*, the NRC reasons that NEPA analysis of the risk of terrorist attack on a nuclear facility is precluded by security considerations.

3. On February 15, 2004, the CBS television program "60 Minutes" reported that terrorists have in the past penetrated multiple levels of security at the Y-12 nuclear complex in Oak Ridge, Tennessee and at the Los Alamos National Laboratory in New Mexico. Nuclear Insecurity, CBSNEWS.com, February 16, 2004 (<http://www.cbsnews.com/stories/2004/02/12/60minutes/main599957.shtml>).

Private Fuel Storage, 56 NRC at 354- 357. This Circuit, however, has held that there is no “national defense” exception to NEPA. *No GWEN Alliance of Lane County, Inc. v. Aldridge*, 855 F.2d 1380, 1384 (9th Cir. 1988); *accord*, *Concerned About Trident v. Rumsfeld*, 555 F.2d 817, 823 (D.C. Cir. 1977). Obviously, any written analysis of the possibility and consequences of a terrorist attack on a nuclear facility, such as the proposed ISFSI at Diablo Canyon, and any public hearing on the measures to be taken to reduce that risk and minimize those consequences, will have to be carefully conducted to prevent the disclosure of sensitive security information.^{4/} But the need to invoke such safeguards does not mean that the NRC need not carefully analyze the nature and extent of the risk faced by the public in the event of a terrorist attack on a proposed nuclear facility. Nor, in the face of such an identified risk and likely harmful consequences, does it mean that the public should be completely precluded from participating in the NRC’s decision whether to license a particular facility and in the NRC’s selection of the conditions to be imposed on such a license.

4. The NRC has previously conducted *in camera* hearings on Diablo Canyon security issues. Interested parties, including representatives of the Attorney General of California, and pre-screened members of the public, participated in those hearings.

In *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139, 143 (1981), for example, the “[Supreme] Court held that the Navy must consider [the] environmental effects of constructing a nuclear weapons dump in Hawaii, but need not publish the portions of an environmental impact statement which would jeopardize national secrets.” *No GWEN Alliance*, 855 F.2d at 1384.

II.

THE NRC’S FAILURE TO EVALUATE THE ENVIRONMENTAL EFFECTS OF TERRORISM DIRECTED AGAINST THE PROPOSED EXPANDED NUCLEAR WASTE STORAGE FACILITIES VIOLATES NEPA

The NRC’s determination that PG&E need not include *any* discussion of the environmental impact of potential acts of terrorism or sabotage in its analysis of the environmental consequences of constructing and operating the proposed ISFSI fails to meet NEPA’s most basic requirements. The NRC’s determination not to conduct hearings (subject to appropriate security procedures) at which interested members of the public might propose alternatives to the proposed ISFSI, or might suggest how the ISFSI can be designed to minimize the potential for successful terrorist attack, similarly violates NEPA.

The NRC’s formal procedures for evaluating the environmental consequences

of its decisions, and for ensuring public participation in that evaluation, differ from those of other federal agencies. Nonetheless, NEPA applies to NRC decisions, and the NRC's evaluation of the environmental consequences of its decisions must meet NEPA's standards. *Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n.*, 449 F.2d 1109, 1117 (D.C. Cir. 1971).

One of NEPA's primary goals is to integrate "environmental amenities and values" with the economic and technical considerations more typically included in federal government decision making. *Public Citizen v. Department of Transp.*, 316 F.3d 1002, 1010 (9th Cir.), *cert. granted sub nom. Department of Transp. v. Public Citizen*, ____ U.S. ____, 124 S.Ct. 957 (2003). To promote environmentally sensitive government decision-making, NEPA requires federal agencies to prepare an Environmental Impact Statement (EIS) for all "major Federal actions significantly affecting the . . . environment." 42 U.S.C. § 4332(2)(C); *Public Citizen*, 316 F.3d at 1021.

Where the impacts of a project are unclear, an agency may first prepare a more limited document to determine whether the proposed action may have a significant environmental effect. *National Parks & Conservation Ass'n. v. Babbitt*, 241 F.3d

722, 730 (9th Cir. 2001) (citing 40 C.F.R. § 1501.4), *cert. denied*, 534 U.S. 1104 (2002). Such a limited document must include brief discussions of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted, and provide the evidence and analysis required for determining whether the agency must prepare an EIS for the project. *Save the Yaak Comm. v. Block*, 840 F.2d 714, 717-18 (9th Cir. 1988) (citing 40 C.F.R. § 1508.9). “If [such a preliminary analysis] establishes that an agency’s ‘action may have a significant effect upon the . . . environment, an EIS must be prepared.’” *National Parks & Conservation Ass’n.*, 241 F.3d at 730, quoting *Foundation for N. Am. Wild Sheep v. United States Dept. of Agric.*, 681 F.2d 1172, 1178 (9th Cir. 1982).

NEPA and the Ninth Circuit case law interpreting it establish “a relatively low threshold for the preparation of an EIS.” *Natural Resources Defense Council v. Duvall*, 777 F.Supp. 1533, 1537 (E.D. Cal. 1991); *see also Save the Yaak*, 840 F.2d at 717. In this case, Petitioners need not establish that the proposed expansion of PG&E’s nuclear waste storage facilities at Diablo Canyon *will* result in an increased risk of terrorist attack at Diablo Canyon for this Court to require the NRC to include the environmental consequences of potential acts of terror directed against PG&E’s

proposed ISFSI in its environmental analysis of that facility, and to require the NRC to include interested members of the public in its evaluation of those consequences. Nor need the Petitioners show that the proposed expansion of Diablo Canyon's nuclear waste storage facilities *will* result in an increase in the adverse environmental consequences that would result from a successful attack on Diablo Canyon for this Court to require the NRC to analyze the environmental consequences of such potential acts of terror. This Court may require the NRC to conduct such an analysis, and to include members of the public in its conduct of that analysis, if the Petitioners raise a "substantial question" whether the proposed ISFSI may -- by virtue of increasing either the likelihood or consequences of a successful terrorist attack on Diablo Canyon--have a significant effect on the environment. *See National Parks & Conservation Ass'n.*, 241 F.3d at 730 (EIS must be prepared if project "may" have significant environmental impact); *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1998) (EIS must be prepared if plaintiff raises "substantial question" whether project may have significant environmental effect). And the statements of the President, the members of his cabinet, and other federal officials, and the conduct of the NRC itself, offer strong evidence that the proposed ISFSI will

have such an effect on the California environment.

A federal agency's decision to proceed with a major action without preparing an EIS is governed by the "arbitrary and capricious" standard. *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 891 (9th Cir. 2002). This Circuit has held that an agency acts arbitrarily and capriciously if it has:

relied on factors which Congress has not intended it to consider; entirely failed to consider an important aspect of the problem; offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Southwest Ctr. for Biological Diversity v. United States Forest Service, 100 F.3d 1443, 1448 (9th Cir. 1996) (citations omitted).

By this standard, the NRC has acted arbitrarily and capriciously. Not only has the NRC entirely failed to address a critical, potential environmental impact of the proposed expansion of the nuclear waste storage facilities at Diablo Canyon, it has offered an explanation for its decision that is counter to the evidence before it and defies common sense.

"Additionally, an agency's decision [to proceed without the benefit of an EIS that addresses all potential environmental consequences of a proposed project] will

be considered unreasonable if the agency fails to supply a convincing statement of reasons why potential effects are insignificant.” *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998), *cert. denied*, 527 U.S. 1003 (1999), quoting *Save the Yaak*, 840 F.2d at 717. The statement of reasons is “crucial” to determining whether the agency has taken the requisite “hard look” at the potential environmental impacts of the proposed project. *Save the Yaak*, 840 F.2d at 717. A Court may defer to an agency a decision to proceed without preparing an EIS only when that decision is “fully informed and well considered.” *LaFlamme v. Federal Energy Regulatory Comm’n.*, 852 F.2d 389, 398 (9th Cir. 1988) (citations omitted). Finally, when members of the public suggest reasonable alternatives to a proposed agency action, a federal agency should prepare an Environmental Impact Statement that compares the reasonably foreseeable environmental effects of the project as proposed with the reasonably foreseeable environmental effects of the alternative. *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm’n.*, 606 F.2d 1261, 1269-70 (D.C. Cir. 1979).

Measured by these standards, the NRC’s refusal to require an evaluation of the environmental consequences of potential acts of terror and sabotage directed at the

proposed ISFSI, and to allow the Petitioners, state and local government agencies, and other interested members of the public, to present their views on those impacts and how they might be avoided or minimized, is arbitrary and capricious. Far from taking a “hard look” at the increased risk of terrorist attack, and the increased environmental consequences of a successful terrorist attack, posed by the proposed expansion of the nuclear waste storage facilities at Diablo Canyon, the NRC refused even to consider the issue. Far from supplying a thoughtful statement of reasons for its refusal to address the issue, the NRC, instead, simply asserted that the “possibility of a terrorist attack [on a proposed nuclear facility] is speculative and simply too far removed from the natural or expected consequences of agency action to require a study under NEPA,” *Pacific Gas & Electric Co.*, 57 NRC at 6, and “that NEPA’s public process is not an appropriate forum for considering sensitive security issues.” *Id.* at 7. As we have seen, these conclusory statements are unfounded, contrary to statements made by the President, his cabinet officers and the NRC itself, and ignore *in camera* procedures previously employed by the NRC for holding hearings on Diablo Canyon security matters.

Finally, the NRC failed to consider any alternatives to the ISFSI as proposed,

including proposals to make the proposed ISFSI more secure from terrorist attack and less likely to cause injury to the public or to the environment if successfully attacked, that the Petitioners, among others, sought to suggest. Indeed, the NRC refused to allow any presentation of such proposals.

CONCLUSION

For the foregoing reasons, amici respectfully request this Court to require the NRC to fulfill its obligations under NEPA by: 1) assessing the potential environmental consequences of an act of terror or sabotage directed against the proposed ISFSI at Diablo Canyon; and 2) conducting hearings (subject to measures necessary to protect the security of Diablo Canyon) on those potential environmental impacts and on the measures that the NRC might require to minimize both the risk

and the consequences of a successful terrorist attack on the proposed ISFSI.

Dated: March 19, 2004

Respectfully submitted,

BILL LOCKYER
Attorney General of California
MANUEL MEDEIROS
State Solicitor General
THOMAS GREENE
Chief Assistant Attorney General
THEODORA BERGER
Senior Assistant Attorney General



KEVIN JAMES
Deputy Attorney General

Attorneys for Amicus Curiae
State of California

THOMAS F. REILLY
Attorney General of Massachusetts
NORA CHOROVER
Assistant Attorney General

Attorneys for Amicus Curiae
Commonwealth of Massachusetts

MARK SHURTLEFF
Attorney General of Utah
DENISE CHANCELLOR
Assistant Attorney General

Attorneys for Amicus Curiae
State of Utah

CHRISTINE O. GREGOIRE
Attorney General of Washington

Attorney for Amicus Curiae
State of Washington

CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I hereby certify that the attached Brief of the States of California, Massachusetts, Utah and Washington as Amici Curiae in Support of Petitioners is proportionately spaced, has a typeface of 14 points or more and contains 4,502 words as measured by the computer program that was used to prepare the brief.

Dated: March 19, 2004

Respectfully submitted,

BILL LOCKYER, Attorney General
of the State of California

MANUEL MEDEIROS

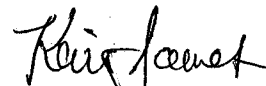
State Solicitor General

THOMAS GREENE

Chief Assistant Attorney General

THEODORA BERGER

Senior Assistant Attorney General



KEVIN JAMES

Deputy Attorney General

Attorneys for Amicus Curiae State of
California

DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: *San Luis Obispo Mothers for Peace, et al. v.
United States Nuclear Regulatory Commission, et al.*

No.: 03-74628

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 1515 Clay Street, 15th Floor, Oakland, California 94612.

On March 19, 2004, I served the attached **BRIEF OF THE STATES OF CALIFORNIA, MASSACHUSETTS, UTAH AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF PETITIONERS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid with the **FEDERAL EXPRESS** addressed as follows:

Greer Goldman, Esq.
Appellate Division
Environment and Natural Resources
U.S. Department of Justice
601 D Street N.W.
Washington, D.C. 20026
Attorneys for Respondent United States of America

Charles E. Mullins, Esq.
E. Leo Slaggie, Esq.
John F. Cordes, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852
Attorneys for Respondent United States Nuclear Regulatory Commission

Declaration of Service by Overnight Courier Cont.

David A. Repka, Esq.
Brooke D. Poole, Esq.
Winston & Strawn, LLP
1400 L Street N.W.
Washington, D.C. 20005-3502
Attorneys for Intervenor-Respondent Pacific Gas & Electric Company

Diane Curran, Esq.
Harmon, Curran, Spielberg & Eisenberg, L.L.P.
1726 M Street N.W., Suite 600
Washington, D.C. 20036
Attorneys for Petitioners

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 19, 2004, at Oakland, California.

TANISHA MARSHALL

Declarant



Signature